IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]8

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD W. YARLING
13 North Pennsylvania Street
Indianapolis, Indiana

WILBERT MCINERNEY
One Thousand Connecticut Avenue
Washington, D. C.

ROBERT S. SMITH
13 North Pennsylvania Street
Indianapolis, Indiana

*Counsel for Petitioner*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

# INDEX

## Subject Index



## CITATIONS

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

---

No.

---

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA, *Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

Petitioner, Robert L. Schlagenhauf, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on July 23, 1963.

### OPINIONS BELOW

The District Court for the Southern District of Indiana rendered no opinion, and the opinion of the Court of Appeals for the Seventh Circuit is not yet officially reported. It is, however, printed as an Appendix to this Petition and appears in the Record at page 77.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on July 23, 1963 (R. p. 89), and copy thereof is appended to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## QUESTIONS PRESENTED

In a diversity suit for damages as filed by injured bus passengers in the United States District Court for the Southern District of Indiana against this petitioner and other defendants, one of the defendants filed a cross-claim for property damage against this petitioner, and the cross-claimant and two other defendants to the original action then sought under Rule 35 of the Federal Rules of Civil Procedure to require this petitioner, who was the driver of the bus in which the passenger plaintiffs were injured, to submit to physical and mental examinations by an internist, an ophthalmologist, a neurologist and a psychiatrist. The respondent judge of the District Court then ordered this petitioner to submit to physical and mental examinations by two named internists, two named ophthalmologists, three named neurologists and two named psychiatrists, a total of nine examinations despite the fact that only four examinations had been requested. The petitioner thereupon petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus under 28 U.S.C. § 1651 (a) directed to the respondent commanding him to vacate the orders for the said examinations. The Court of Appeals by a two to one decision denied the petition. The questions presented are:

1. Whether the respondent had the power to enter a Rule 35 discovery order for physical and mental examinations of a defendant who is not himself claiming damages for personal injuries.

2. Whether the respondent abused his discretion under the provisions of Rule 35 in ordering physical and mental examinations of a defendant whose physical and mental condition was not in controversy and in the absence of a sufficient showing of good cause.

3. Whether the respondent abused his discretion in ordering nine separate physical and mental examinations of a defendant even though only four such examinations were sought by the petitioning parties.

4. Whether the order of the respondent violated the petitioner Robert L. Schlagenhauf's substantive right of privacy and his constitutional rights under the 4th, 5th and 13th Amendments of the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES INVOLVED

4th Amendment, United States Constitution

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5th Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14th Amendment, United States Constitution

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction."

28 U.S.C § 1254 (1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

28 U.S.C. § 1651 (a):

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2072:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writes, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right

of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary not withstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Rule 35 (a), Federal Rules of Civil Procedure:

"(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

## STATEMENT

A diversity action involving in excess of the required jurisdictional amount was brought in the United States District Court for the Southern District of Indiana by three plaintiffs seeking damages resulting from personal injuries sustained as the result of a collision between a bus and a tractor-trailer occurring in the State of Indiana on July 13, 1962, as allegedly caused by the concurrent negligence of the defendants The Greyhound Corporation, owner of the bus; Robert

L. Schlagenhauf, the bus driver; Contract Carriers, Inc., owner of the tractor; Joseph L. McCorkhill, driver of the tractor; and National Lead Company, owner of the trailer. After the original complaint had been amended (R. pp. 15-23), answers were filed on behalf of all defendants, and the defendant The Greyhound Corporation filed its amended cross-claim for bus damage against Contract Carriers, Inc. and National Lead Company (R. pp. 24-32), and the defendant National Lead Company filed its cross-claim for trailer damage against The Greyhound Corporation and Robert L. Schlagenhauf (R. pp. 56-59). Contract Carriers, Inc. filed a letter, pursuant to the respondent's order, setting forth the specific allegations relied upon in defense of Greyhound's cross-claim including the following:

> "4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation." (R. p. 38).

Robert L. Schlagenhauf, petitioner herein, is not a party to the cross-claim in connection with which these allegations were made. The only allegation concerning petitioner's physical or mental condition in the cross-claim of National Lead Company, to which the petitioner is a party defendant, is "that the defendant, The Greyhound Corporation acting by and through its said agent . . . and its said employee, . . . were guilty

of carelessness and negligence in one or more of the following particulars:

> . . . (8) By permitting said bus to be operated over and upon said public highway by said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was (sic) impaired and deficient." (R. p. 58).

No similar allegations were made by the plaintiffs in their amended complaint.

On February 5, 1963, Contract Carriers, Inc., Joseph McCorkhill, and National Lead Company filed a joint petition for an order requiring Robert L. Schlagenhauf to submit to physical and mental examinations "by a competent, qualified specialist" in each of the fields of internal medicine, ophthalmology, neurology, and psychiatry on the stated ground that "the physical and mental condition of the defendant Robert L. Schlagenhauf, is in controversy and is at issue in this action now pending, being specifically raised by the charge of negligence applicable thereto in the second paragraph of affirmative answer on the part of the defendants, Contract Carriers, Inc., and Joseph L. McCorkhill, to the defendant Greyhound's cross-claim" (R. pp. 8-10). The said petition further nominated two named physicians in the field of internal medicine, two in the field of ophthalmology, three in the field of neurology, and two in the field of psychiatry and asked that one physician in each such category be appointed for a total of four examinations. The only effort on the part of the moving parties to show good cause for

any of the examinations was the assertion, supported by affidavit (R. p. 14), of the following grounds:

> "(1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flat rock, Michigan, while driving a motor bus for the defendant, Greyhound Corporation.
>
> (2) The lights of the tractor-trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.
>
> (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course."

Neither the petition nor the affidavit showed how long ago the earlier accident had occurred nor how the bus driver was "involved", that the lights of the tractor-trailer either were visible or should have been visible to the bus driver at the distance of one-half to three-quarters mile during which distance they were visible to another driver in another vehicle travelling ahead of the bus, that the red lights admittedly seen by the bus driver for ten to fifteen seconds prior to impact were on the tractor-trailer with which the bus collided, that there is no adequate alternate method of making proof of petitioner's physical and mental condition, nor that the examinations sought now would shed light on the condition of the bus driver as it existed on July 13, 1962. No hearing was held, but the respondent on February 21, 1963, granted the petition and ordered this petitioner to submit to physical and mental examinations by two named internists, two named ophthalmologists, three named neurologists and two named psychiatrists (R. pp. 6, 7). On March 13, 1963

the petitioner filed in the Court of Appeals his petition for writ of mandamus directed to the respondent commanding him to vacate the order of February 21, 1963 (R. pp. 1-5). On March 14, 1963 the defendants Contract Carriers, Inc. and Joseph L. McCorkill by one petition (R. pp. 60-66) and the defendant National Lead Company in a separate petition (R. pp. 69-76) again asked for the same physical and mental examinations of Robert L. Schlagenhauf, and the new petitions were termed "supplementary" to the original petition allegedly because the physicial and mental condition of Robert L. Schlagenhauf had become additionally in issue by virtue of the National Lead Company cross-claim which was filed subsequent to the filing of the original joint petition. There was no additional effort to show good cause for the granting of the requested order and no affidavit was filed in support of the new National Lead Company petition. On March 15, 1963 the respondent entered orders sustaining the amended or supplemental petitions and requiring that Robert L. Schlagenhauf submit to physical and mental examinations by the same nine physicians named in the original order of February 21, 1963 (R. pp. 67-68 and 75, 76). The orders of March 15, 1963 were substantially identical to the original order except that the order issued upon the new petition of the defendants Contract Carriers, Inc. and Joseph L. McCorkhill required compliance by May 1, 1963 while the order issued upon the new petition of the defendant National Lead Company required compliance by April 1, 1963. The Court of Appeals stayed the orders pending disposition of the petition for writ of mandamus and has now again stayed proceedings pending the filing and disposition of this petition for writ of certiorari. The Court of Appeals entered a rule against

the respondent to show cause why a writ of mandamus should not be issued (R. pp. 40, 41), and the respondent filed his answer on April 27, 1963 (R. pp. 42-47). On July 23, 1963 the Court of Appeals rendered an opinion (R. pp. 77-88) and entered judgment (R. p. 89) denying the petition for writ of mandamus by a two to one decision, Circuit Judge Swygert and District Judge Grant constituting the majority and Circuit Judge Kiley dissenting with opinion. The Court of Appeals applied the principles relating to the issuance of a writ of mandamus as stated in *Labuy* v. *Howes Leather*, 352 U.S. 249, 257 (1957) and properly asserted at the outset that the writ of mandamus should be denied "Unless we are prepared to say that the district court was without power to enter the Rule 35 discovery order or that the district court so clearly abused his discretion as to make the equities of this case truly extraordinary, precluding adequate relief by way of appeal." The Court then concluded that Rule 35 applies to a party defendant as well as to a party plaintiff, that this petitioner is a party as to National Lead Company only and is still not a party as to Contract Carriers, Inc. and Joseph L. McCorkhill, that the respondent had the power under Rule 35 as declared procedural and therefore valid in *Sibbach* v. *Wilson & Company*, 312 U.S. 1 (1941) to order physical and mental examinations of a party defendant if such party's physical and mental condition is in controversy and if good cause is shown, and that although it is difficult to determine whether the mental and physical condition of a party defendant who himself is making no claim for damages for personal injuries is in controversy, such condition of the petitioner Robert L. Schlagenhauf may be said to be in controversy in the action for damages asserted by Na-

tional Lead Company in its cross-claim. Finally and in summary the Court of Appeals concluded that the respondent acted within his power in ordering an examination under Rule 35 and that the alleged abuse of discretion in exercising the power must await review on appeal from a final judgment. Judge Kiley in his dissenting opinion agreed that the petitioner is a "party" subject to Rule 35 as to National Lead Company but expressed doubt as to whether petitioner's physical and mental condition is "in controversy" within the meaning of the rule and concluded that in any event good cause as required by Rule 35 was not sufficiently shown to justify the ordering of the nine examinations, particularly the mental tests, and that therefore respondent committed gross error amounting to an abuse of discretion which justified the issuance of a writ of mandamus.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision below should be reviewed because the Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been but should be settled by this Court and has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

1. The Court of Appeals has itself recognized the importance of the questions involved and has affirmed the fact that there has heretofore been no prior decision in point as stated in the opening paragraph of the majority opinion:

> "Robert L. Schlagenhauf petitions for a writ of mandamus (28 U.S.C. § 1651 (a), the All Writs Act) directed to the Honorable Cale J. Holder, district judge. The petition raises an important

> question respecting the scope of Rule 33, Fed. R. Civ. P., viz, whether a federal district court has the power to order a mental or physical examination of a person who is a defendant in a tort action. We know of no prior decision directly in point."

2. Although the Court of Appeals has concluded that the respondent did have the power to order the physical and mental examination of the petitioner upon the authority of this Court's decision in the *Sibbach* v. *Wilson & Co.* case (*supra*), it is submitted that the *Sibbach* decision only stands for the proposition that Rule 35 is procedural and invades no substantive right within the terms of the Enabling Act (former 28 U.S.C. § 723 b-c, now 28 U.S.C. § 2072) when applied to plaintiffs or other parties who voluntarily resort to the federal courts and thereby "waive" a portion of their rights to claim the inviolability of their persons. The *Sibbach* decision does not determine the validity of an attempt to use Rule 35 to force a defendant who becomes a party in a federal court against his will and who does not himself make a claim for damages for personal injuries to suffer invasion of his person in the form of physical and/or mental examinations. Neither the Court of Appeals in its opinion nor this Court has answered the rhetorical question posed at 3 Ohlingers Federal Practice (Rev. Ed.) 610 as quoted in the subject opinion (R. p. 84):

> "Finally, in *Sibbach* v. *Wilson & Co.* (1941), 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479, by a five to four decision rendered on January 13, 1941, the Supreme Court declared that the rule is procedural in character and that it invades no "substantive" right within the terms of the Enabling Act, as distinguished from a right which is merely "substantial" or "important". To the suggestion that the rule offends the important right to free-

> dom from invasion of the person the Court replies that it ". . . ignores the fact that a litigant need not resort to the federal courts unless willing to comply with the rule . . ."
>
> This does not, however, answer the point; what of the litigant who does not resort to a federal court has no intention of resorting to it, and does not wish to resort to it—a litigant, for instance, whose case is removed from a state court to a federal court, or who is made a defendant in a federal court against his will—is he exempted by the operation of the rule? The fact remains that Congress has conferred on the federal courts no power to make an order requiring a party to submit to a physical examination."

If Rule 35 does not constitute lawful authority to require physical and mental examinations of a defendant as is respectfully contended by this petitioner, no such authority therefor exists, and this Court has refused to recognize any inherent power in federal courts to order such examinations of the person (*Union Pacific Ry.* v. *Botsford,* 141 U.S. 250 (1891).

3. Even if Rule 35 should be held to constitute lawful authority for the kind of examinations complained of, the power to order them exists only upon compliance with the conditions of the rule as properly stated by the Court of Appeals (R. p. 86). Such Rule expressly applies only to a "party" whose physical or mental condition is "in controversy" and then only if "good cause" is shown.

(a) "Party"—This petitioner was not a "party" within the meaning of Rule 35 as to either Contract Carriers, Inc., Joseph McCorkhill or National Lead Company at the time the original petition for Rule 35 discovery was filed, and he is not yet a party as to either Contract Carriers, Inc. or Joseph L. McCork-

hill (See majority opinion below, R. p. 83). The order of March 15, 1963, therefore, as granted upon the supplementary petition of Contract Carriers, Inc. and Joseph L. McCorkhill, was beyond the power of the respondent notwithstanding the validity or nonvalidity of the additional order of March 15, 1963 as granted upon the unverified second petition of National Lead Company which party by that date had made the petitioner a party defendant to the National Lead Company cross-claim for property damage.

(b) "In Controversy"—The personal injury plaintiffs in their amended complaint did not charge this petitioner with any physical or mental condition contributing to cause the collision involved and have not requested either physical or mental examinations of the petitioner. Aside from the allegations of Contract Carriers, Inc. and Joseph L. McCorkhill in defense of the property damage cross-claim of The Greyhound Corporation, to which this petitioner is not a party, the only pleading allegation concerning the petitioner's physical or mental condition on the date of the accident is that contained in the National Lead Company property damage cross-claim to the effect that this petitioner's vision was defective (R. p. 58). Thus the physical or mental conditions which fall within the medical specialities of internal medicine, neurology or psychiatry clearly should not have been considered "in controversy." It is particularly apparent that the mental condition of the petitioner may not be considered to be "in controversy", and it is suggested that the ordering of psychiatric examinations of the petitioner constitutes a wholly unwarranted invasion of petitioner's right of privacy inasmuch as the conduct of such examinations would necessarily subject the petitioner to the most intimate of inquiries and dis-

closures involving not only himself but all members of his family. No court in any reported case arising under the Federal Rules of Civil Procedure has ever granted an order requiring even an eye examination of a defendant driver in a tort action and certainly never nine examinations in the several medical specialties involved here. As stated in *Wadlow* v. *Humberd*, 27 F. Supp. 210, 212 (W. D. Mo. 1939), "Obviously the Rule (35) looks to a situation in which the mental or physical condition of a party shall be immediately and directly in controversy and not merely in controversy, incidentally or collaterally." It is submitted that the physical and mental condition of the petitioner is not immediately and directly in controversy under the pleadings before the respondent below and that only the condition of the petitioner's vision is even incidentally or collaterally in controversy.

(c) "Good cause"—The requirement that good cause be shown before a Rule 35 order may be entered is expressed mandatorily, and as stated in *Guilford National Bank of Greensboro* v. *Southern Ry. Co.*, 297 F. 2d 921, 924 (4th Cir. 1962), "Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate." In the important matter of showing good cause for the multiple examinations of this petitioner, National Lead Company concluded in its petition upon which the respondent's order of March 15, 1963 was entered only that it could not "properly present" its defense without the four physical and mental examinations asked for (R. p. 71), and good cause was not mentioned in either the National Lead Company petition or the respondent's order. Even the original petition of National Lead Company

as filed jointly with Contract Carriers, Inc. and Joseph L. McCorkhill was supported only by the one-page affidavit of one of the attorneys for Contract Carriers, Inc. averring that the petitioner bus driver had had a prior accident and that another driver on the highway had been able to see the lights upon the tractor-trailer with which the bus driven by the petitioner collided. The respondent entered the orders on March 15, 1963 without a hearing and without inquiry beyond the petitions themselves. As stated by Circuit Judge Kiley in his dissenting opinion (R. p. 88), "It seems to me the constitutional right of personal privacy should not be transgressed in search for truth under Rule 35 in civil cases until the trial court has by inquiry established a sufficient basis upon which to exercise discretion as to whether an order for physical and mental examinations is the only adequate method of reaching the truth about a matter in controversy and whether the truth sought is relevant. That was not done here."

4. The important nature of these issues was expressly recognized by the Court of Appeals as aforesaid, and it is evident that appeal is a wholly inadequate remedy in that the invasions of the petitioner's person and the deprivation of his liberty would necessarily have become an accomplished fact at the time of final judgment in the property damage cross-claim below unless petitioner would elect to refuse examination, thus becoming subject to the drastic penalties authorized by Rule 37 (b) (2) of the Federal Rules of Civil Procedure. It is suggested that the enforced delivering up of one's person to restraint or interference by others is far more than a technical or unimportant invasion of personal privacy and that it is indeed irreparable in that it cannot be righted or re-

tracted. As stated by this Court in *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250, 251 (1891), "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . ." If petitioner is required to submit to all or any of the examinations now ordered, his rights under the Fourth, Fifth and Thirteenth Amendments to the United States Constitution will have been thereby irretrievably violated, and the effect of the decision below, if unreversed, can be expected to similarly deprive defendant drivers in other tort actions of their constitutional rights.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this case is a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction and that this petition for writ of certiorari should be granted.

RICHARD W. YARLING
13 North Pennsylvania Street
Indianapolis, Indiana

WILBERT MCINERNEY
One Thousand Connecticut Avenue
Washington, D. C.

ROBERT S. SMITH
13 North Pennsylvania Street
Indianapolis, Indiana

*Counsel for Petitioner*

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

No. 14103

Before HON. ROGER J. KILEY, *Circuit Judge*, HON. LUTHER M. SWYGERT, *Circuit Judge*, HON. ROBERT A. GRANT, *District Judge*.

ROBERT L. SCHLAGENHAUF,
*Petitioner*,

vs.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA,
*Respondent*.

On Petition for Writ of Mandamus.

Tuesday, July 23, 1963

This matter comes before the Court on the petition of Robert L. Schlagenhauf for a writ of mandamus, the response of respondent thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the said petition of Robert L. Schlagenhauf for a writ of mandamus be, and the same is hereby, DENIED, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14103

SEPTEMBER TERM, 1962 APRIL SESSION, 1963

ROBERT L. SCHLAGENHAUF,
*Petitioner,*

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA,
*Respondent.*

On Petition for Writ of Mandamus.

July 23, 1963

Before KILEY and SWYGERT, *Circuit Judges,* and GRANT, *District Judge.*

SWYGERT, *Circuit Judge.* Robert L. Schlagenhauf petitions for a writ of mandamus (28 U. S. C. § 1651(a), the All Writs Act) directed to the Honorable Cale J. Holder, district judge. The petition raises an important question respecting the scope of Rule 35, Fed. R. Civ. P.,[1] viz,

[1] Rule 35 of the Federal Rules of Civil Procedure provides: Rule 35. Physical and Mental Examination of Persons. (a) Order for examination. In an action in which the mental or physical condiction of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

whether a federal district court has the power to order a mental or physical examination of a person who is a defendant in a tort action. We know of no prior decision directly in point.[2]

Because the question is fundamental, going to the court's power to require a medical examination of a defendant in a civil action, we directed the district judge to show cause why the writ should not issue. After a response to our order had been filed on behalf of the district judge and after briefs had been submitted by the parties to the litigation, oral argument was heard.

A diagrammatic description of the history of the litigation is presented in order to show how the question arises.

| | |
|---|---|
| Jennie Markiewicz, John Anthony Markiewicz, Edward Markiewicz (husband and father, respectively, of Jennie and John Anthony),<br>v.<br>The Greyhound Corporation, Robert L. Schlagenhauf, (the driver of the Greyhound bus), Contract Carriers, Inc., Joseph L. McCorkhill, (the driver of Contract Carriers' truck-tractor), National Lead Company (the owner of the trailer being pulled by Contract Carriers). | Diversity action seeking damages for the personal injuries suffered by Jennie and John Anthony Markiewicz, passengers on the Greyhound bus, and for loss of their services sustained by John Markiewicz, all resulting from bus collision with the trailer being pulled by Contract Carriers. The accident occurred July 13, 1962, on U.S. Highway 40 in Hendricks County, Indiana. Complaint was filed July 17, 1962, as amended November 8, 1962. |

[2] 8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2220 lists many analogous situations arising in the common law, but we are here concerned with a specific application of the term "party" found in Rule 35.

| | |
|---|---|
| The Greyhound Corporation,<br>v.<br>Contract Carriers, Joseph L. McCorkhill, National Lead Company,<br>v.<br>General Motors Corporation (third party defendant). | Cross-claim for damages to Greyhound's bus. |
| National Lead Company,<br>v.<br>Greyhound Corporation, Robert L. Schlagenhauf. | Cross-claim for damages to National's trailer. |

After the original complaint had been amended, Greyhound answered and filed its cross-claim. Contract Carriers and McCorkhill also answered the amended complaint.

Contract Carriers and McCorkhill filed a letter, pursuant to the district court's order, setting forth the specific allegations relied on in defense of Greyhound's cross-claim. Among these allegations is:

> 4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation.

National Lead also filed its answer to the amended complaint together with an answer to Greyhound's cross-claim. One of the defenses asserted to Greyhound's cross-claim was that the negligence of the driver of the bus, Schlagenhauf, proximately caused the damages to the bus owned by Greyhound.

National Lead's cross-claim alleged "that the defendant, The Greyhound Corporation acting by and through

its said agent . . . and its said employee, [Schlagenhauf] . . . were guilty of carelessness and negligence in one or more of the following particulars:

> (8) By permitting said bus to be operated over and upon said public highway by said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was (sic) impaired and deficient.

On February 5, 1963, Contract Carriers, McCorkhill, and National Lead filed a joint petition for an order requiring Robert L. Schlagenhauf to submit to a series of mental and physical examinations. The petitions gave the following reasons for such request:

> (1) The defendent, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.
>
> (2) The lights of the tractor trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.
>
> (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.

The petition further alleged that separate examinations are required by multiple experts because no one expert could examine Schlagenhauf respective to all the conditions which related to his driving ability. In all four examinations were requested.

The district court on February 21, 1963, granted the petition and ordered Schlagenhauf to submit to mental and physical examinations by two named internists, two named ophthalmologists, three named neurologists and two named

psychiatrists, despite the fact that only four examinations had been requested.

On March 14, 1963, Contract Carriers, McCorkhill, and National Lead filed supplemental petitions for examinations of Schlagenhauf. These were supplementary to the original petition allegedly because the mental and physical condition of Schlagenhauf became additionally in issue by virtue of National Lead's cross-claim filed subsequent to the petition of February 5.

On March 15, 1963, the district court issued an order (which superseded its February order) granting the supplemental petitions and ordering Schlagenhauf to appear before the nine medical experts for psychiatric and physical examinations. This court stayed the orders pending our disposition of the instant petition for writ of mandamus.

We are mindful of the stringent restrictions that have been placed on the issuance of the write of mandamus, and its limitation to "the exceptional case where there is clear abuse of discretion or usurpation of judicial power. . . ." *Labuy* v. *Howes Leather*, 352 U. S. 249, 257 (1957).

In *Labuy*, the Supreme Court, on certiorari to the Seventh Circuit, in language that we deem pertinent to the instant petition said:

> As this Court pointed out in *Las Angeles Brush Corp.* v. *James*, 272 U. S. 701, 706 (1927): ". . . [W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707, were the Court ". . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain [him] . . . (at 256).

Certainly the writ is not to be used as a substitute for appeal. *Ex Parte Fahey*, 332 U. S. 258 (1947). It should not be availed of to correct mere error in the exercise of conceded judicial power, although it may possibly be used to prevent usurpation of power, if "the lower court is clearly without jurisdiction." *Ward Baking Co.* v. *Holtzoff*, 164 F. 2d 34, 36 (2nd Cir. 1947). The writ will not issue to permit this court to exercise the discretion entrusted by law to the district court. *Fisher* v. *Delehart*, 250 F. 2d 265 (8th Cir. 1957); *Goldberg* v. *Hoffman*, 226 F. 2d 681 (7th Cir. 1955).

Unless we are prepared to say that the district court was without power to enter the Rule 35 discovery order, or that the district court so clearly abused his discretion as to make the equities of this case truly extraordinary, precluding adequate relief by way of appeal, then the writ must and should be denied.

The Supreme Court in *Sibbach* v. *Milson & Co., Inc.*, 312 U. S. 1 (1941), settled the question whether Rule 35 abridges substantive rights of a litigant in contravention of the limitations against such abridgment specified in the Rules Enabling Act of June 19, 1934, 28 U. S. C. § 723 b-c. The Court held that the rule comes within the ambit of the statute regulating "procedure—the judicial process for enforcing rights and duties recognized by the substantive law. . . ."

*Sibbach* is important because the Court there held that Rule 35 constitutes the lawful authority necessary for the exercise of a district court's power to order mental and physical examinations of a party. Without such lawful authority, the Supreme Court had refused to recognize inherent power in federal courts to order physical examinations of the person. In *Union Pac. Ry.* v. *Botsford*, 141 U. S. 250 (1891), the Court enunciated its rationale for denying inherent power:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." (at 251).
>
> • • • • •
>
> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. (at 252).

Today, in a number of our states, statutes, rules of court, and in some states, decisions, provide procedural techniques for the discovery of the mental and physical condition of a party similar to that provided for in Rule 35. Numerous decisions, both state and federal, attest to the soundness of the medical discovery provisions.[3] This type of discovery has most frequently been applied in situations in which the moving party is a defendant asking for a mental or physical examination of a plaintiff so as to ascertain the extent of the latter's injuries. This was the situation in *Sibbach*. Indeed, the cases seem to proceed on the theory that a plaintiff who seeks redress for injuries in a court of law thereby "waives" a portion of his right to claim the inviolability of his person. In the

---

[3] For a thorough and scholarly discussion listing statutes and cases, see 8 WIGMORE, EVIDENCE § 2220 (McNaughton rev. 1961). See also: Developments In The Law—Discovery, 74 Harv. L. Rev. 942, 1022-27 (1961).

interests of justice, the plaintiff, by seeking relief, must submit to a physical examination to aid in the ascertainment of the truth of his claims—he may not conceal, or make difficult of proof, that which is the very basis of his action and which is particularly within his knowledge.

The fact remains, however, that Rule 35 refers to examination of a "party." It would do violence to the clear wording of the rule to hold that only certain types of parties come within its terms. Obviously those drafting the rules, the Supreme Court, which adopted them, and the Congress that tacitly approved them as discussed in *Sibbach*, were all cognizant of the fact that "party" means both plaintiffs and defendants in civil litigation.

It is well to point out that we do not believe Schlagenhauf became a "party" within the meaning of Rule 35 in so far as the present applications for examinations are concerned until the cross-claim filed by National Lead named him a party defendant (as to Contract Carriers and McCorkhill he is not yet a party). The original suit by Markiewicz, et al., although listing Schlagenhauf as a party defendant, is separate and distinct from the cross-claims filed by the various defendants in the Markiewicz suit. Moreover, Schlagenhauf did not assume the status of a party defendant vis-a-vis Contract Carriers and McCorkhill merely by their listing his name in affirmative defenses to the cross-claim against them by Greyhound. Only upon the filing of the cross-claim by National Lead did Schlagenhauf enter the litigation as a "party" within the ambit of Rule 35 with respect to National Lead's petition for mental and physical examinations.

Rule 35 requires that the person to be examined be a "party" and this requirement is basic to the rule's application. *Dulles* v. *Quan Yoke Fong*, 237 F. 2d 496 (9th Cir. 1956); *Fong Sik Leung* v. *Dulles*, 226 F. 2d 74 (9th Cir. 1955); *Kropp* v. *General Dynamics Corp.*, 202 F. Supp. 207 (E. D. Mich. 1962). We decline to follow the reasoning in

*Dinsel* v. *Pennsylvania R.R. Co.*, 144 F. Supp. 880 (W. D. Pa. 1956), that appears to recognize inherent power in a federal court to order physical examinations of persons not parties to the pending action. Such reasoning cannot be accommodated to the language of the Supreme Court in *Botsford* and *Sibbach*. Furthermore, the very terms of Rule 35 restrict such examination to parties.

It should also be pointed out that Schlagenhauf was not a "party" to Greyhound's cross-claim merely by reason of his being an agent of Greyhound. The Supreme Court declined to adopt a proposed amendment to Rule 35 recommended by The Advisory Committee in its Final Report of October, 1955, that would have added the phrase, 'or of an agent or a person in the custody or under the legal control of a party," to the rule.[4] In view of that Court's failure to adopt the recommended amendment we decline to extend the coverage of the rule by decision so as to include agents of parties.

What confronts us then is the question of the power of the district court to order, on the application of National Lead, mental and physical examinations of petitioner who became a party defendant by virtue of National Lead's cross-claim. In this regard we must answer the rhetorical question posed in 3 Ohlingers Federal Practice (Rev. Ed.) 610—:

> Finally, in *Sibbach* v. *Wilson & Co.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, by a five to four decision rendered on January 13, 1941, the Supreme Court declared that the rule is procedural in character and that it invades no "substantive" right within the terms of the Enabling Act, as distinguished from a right which is merely "substantial" or "important". To the suggestin that the rule offends the important right to freedom from invasion of the person the court replies that it ". . . ignores the fact that a litigant need not resort

[4] MOORE FEDERAL PRACTICE ¶ 35.01, at 2552 (Supp. 1962).

> to the federal courts unless willing to comply with the rule. . . ."
>
> This does not, however, answer the point; what of the litigant who does not resort to a federal court, has no intention of resorting to it, and does not wish to resort to it—a litigant, for instance, whose case is removed from a state court to a federal court, or who is made a defendant in a federal court against his will—is he exempted from the operation of the rule? The fact remains that Congress has conferred on the federal courts no power to make an order requiring a party to submit to a physical examination.

In the sense that Rule 37 precludes the use of a contempt citation for enforcement of an order to submit to a physical examination, Congress has not consented to the forcible physical examination of litigants in federal courts. It has, however, according to *Sibbach,* consented to district court orders directing a "party" to submit to a mental or physical examination in actions in which his "mental or physical condition" is "in controversy," if "good cause" for such examination be shown, and Congress has consented to appropriate orders by the district court (short of contempt) in those situations where the "party" refuses to submit to an examination.

In order that a federal district court may properly exercise its power to require a mental or physical examination of a party, Rule 35 requires that the party's mental or physical condition be "in controversy." In a negligence action involving personal injuries of a plaintiff (or of a defendant who by way of counterclaim or cross-claim seeks damages for personal injuries) there is ordinarily no question about that party's mental or physical condition being in controversy. The extent and permanency of his injuries is one of the ultimate fact issues in the case. In the situation we have here, however, where the party sought to be examined is a defendant who himself is making no claim for damages for personal injuries, the question whether his

mental or physical condition is in controversy may be more difficult to decide. See *Wadlow* v. *Humberd*, 27 F. Supp. 210 (W. D. Mo. 1939).

The traditional respect for the inviolability of one's person that our society has consistently fostered—the concern for the individual's rights enunciated by the Supreme Court in the *Botsford* case, must be recognized. Mere lip service to the requirements of "in controversy" and "good cause" in Rule 35 falls short of a district court's duty to litigants, particularly those not voluntarily in court, to protect the individual's right of privacy. The rule was never intended to be used by adverse parties as a means to harass opponents with troublesome mental and physical examinations in the hope that by chance some mental or physical impairment might be discovered. While the party seeking Rule 35 discovery need not prove his case before obtaining an order for discovery, it is incumbent upon him affirmatively to demonstrate: (1) the probability that the adverse party's physical and mental condition is relevant and proximate in point of time to the underlying issues of the litigation and that such condition is in controversy; and (2) good cause to believe that a physical or mental examination would best serve to promote the ascertainment of truth and that other means of discovery or proof are less satisfactory considering the law's solicitude for a party's privacy.

Here the district court had before it a situation involving a catastrophic motor vehicle accident in which several persons were seriously injured (the Mackiewicz, et al. suit potentially involves some $2,000,000.00 in damage claims), and allegations that petitioner had been involved in a similar accident in the past, that petitioner had admitted seeing lights some ten to fifteen seconds prior to impact but made no effort to stop the bus, that the driver of another vehicle was able to clearly see the lights of the truck and trailer over a considerable distance, and that the only human ele-

ment utilized in the operation of the Greyhound bus involved in this accident was petitioner. In addition, National Lead alleged that petitioner's poor eyesight was a contributing factor in the accident.

We believe that the several allegations of negligence made in this case together with the additional matters brought to the attention of the district judge relating to the circumstances of the collision are so intertwined with the mental and physical condition of petitioner that that condition may be said to be in controversy in the action for damages asserted by National Lead in its cross-claim.

Although the "in controversy" requirement of Rule 35 is necessarily related to the showing of good cause required of a movant under the rule, the sufficiency of good cause to grant the motion is not restricted to a demonstration that the mental or physical condition of the adverse party is in controversy. The possibility of alternative proof available to the movant and the burden on the party ought to be examined must be balanced against the need for discovery. Furthermore, the number and kind of examination ordered is subject to the "good cause" requirement. The number of examinations ordered should be held to the minimum necessary considering the party's right to privacy and the need for the court to have accurate information.

In summary, we conclude that a federal district court has the power under Rule 35 to require a party, whether cast in the role of plaintiff or defendant, to submit to a mental or physical examination upon compliance with the conditions of the rule; and in the case at bar that the district court acted within its power in ordering an examination under Rule 35. Petitioner's other contentions, *e.g.*, alleged abuse of discretion in ordering an excessive number of examinations, must await review on appeal from a final judgment.

The petition is denied.

No. 14103.

KILEY, *Circuit Judge*, dissenting.

I respectfully dissent.

I agree with the majority opinion that petitioner is a "party" subject to Rule 35. I have some doubt as to whether petitioner's eyes and mentality are "in controversy" within the meaning of the rule.

But my point of departure with the majority opinion is with respect to the "good cause" requirement of the rule.

In persuasive dictum in *Guilford National Bank of Greensboro* v. *Southern Ry. Co.*, 297 F. 2d 921, 924 (4th Cir. 1962), Judge Sobeloff said:

> There appear to be adequate policy reasons for imposing the good cause requirement in Rules 34 and 35. Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate.

The dictum expresses my view.

When the original order was entered, petitioner was not a party, and was made a party only by the later cross-complaint of National Lead Company. The second order issued upon motions merely stating that petitioner was involved in a similar accident while driving a Greyhound bus, that in the instant collision the lights of the tractor-trailer unit were visible from three-fourths to one-half mile, that petitioner saw the red lights of the truck for a period of ten to fifteen seconds prior to impact, and neither reduced his speed nor altered his course; and that unless the examinations were ordered, "defendants will be without means to properly present evidence on this issue," and "no one will be able to testify upon this important issue."

No hearing was held to inquire into these statements so as to form a sound basis for subjecting petition to the

examinations. A brief hearing might have indicated that there is an adequate alternate method of making proof of petitioner's physical and mental condition; and that the examinations sought now would not shed light on his condition at the time of the accident more than a year ago. On the other hand, the hearing might indicate substantial merit in the grounds urged for the examination order. In either event, the inquiry would establish an adequate basis for exercising the court's discretion as to whether or not the order ought to issue. The record here discloses no adequate basis for discretion.

This court will issue a writ of mandamus where it finds gross error amounting to an abuse of discretion, as in *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299, 304 (7th Cir. 1955). In my view, on what the district court had before it, there was a gross error amounting to an abuse of discretion committed with respect to ordering the nine examinations, particularly the mental tests.

It is clear from reading Professor Wigmore that he is talking about personal injury cases in 8 WIGMORE, EVIDENCE § 2220(F) (McNaughton rev. 1961), and the need for preventing fraud through concealment of the true nature of one's injury. He quotes at length from Justice Schaefer's opinion in *People ex. rel. Noren* v. *Dempsey*, 10 Ill. 2d 288, 292-95, 139 N. E. 2d 780 (1957), where the Justice is speaking about a plaintiff in a personal injury case. Justice Schaefer in that case says that a person claiming damages puts his physical condition in issue and it becomes a fact to be proved, like the fact of the impact in that case. Petitioner did not put his physical and mental condition in issue in the case at bar. These authorities do not compel denial of the writ.

It seems to me the constitutional right of personal privacy should not be transgressed in search for truth under Rule 35 in civil cases until the trial court has by inquiry estab-

lished a sufficient basis upon which to exercise discretion as to whether an order for physical and mental examinations is the only adequate method of reaching the truth about a matter in controversy and whether the truth sought is relevant. That was not done here.

A true Copy:

Teste:

---

*Clerk of the United States Court of Appeals for the Seventh Circuit.*